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No. 583

In the Supreme Court of the United States

October Term, 1951

RAY HOPTOWIT, JOHN DOE and RICHARD ROE,

Petitioners,

v.

SEUFERT BROS. COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S STATEMENT OF FACTS

Respondent, Seufert Bros. Company, commenced this litigation by filing a suit in the Circuit Court of the State of Oregon for Wasco County, in which suit the Respondent sought to restrain the Petitioner, Ray Hoptowit, from repeated trespasses upon the Respondent's land.

Respondent is the owner in fee simple of certain lands which border on the Columbia River on the south side. The lands commence about three miles East of The Dalles, Oregon and extend easterly for some distance. At various points along the river where the Respondent has acquired the shore land there are fishing holes and fishing places where, dur-

ing the fishing season, it has been the custom for the public to gather and fish. The fishermen are both white men and Indians, and some of the Indians are Indians with treaty rights. (R. 30). Some of the fishing holes or places are claimed to be old and accustomed fishing places of the Yakima Tribe of Indians. During the fishing season the Yakima Tribe of Indians fish there along with other members of the public. (R. 30).

The Respondent is a pioneer fish canning and processing concern and, by virtue of its ownership of the land, has enjoyed some advantage in the purchase of fish in competition with other buyers, for the reason that its ownership of the lands gives it easier access to the river than other buyers along the river, as other buyers must use the points of public access. (R. 32). The public, in gaining access to the fishing grounds, cannot trespass upon Respondent's property but must use the points of public access, excepting only that certain of the Indians who fish there by reason of early treaties made with the United States Government have the right of ingress and egress for such purpose over the property, a right which is not enjoyed by the public generally. This right of ingress and egress enjoyed by the Indians with treaty rights just mentioned grows out of treaties made with the Indians involved. (R. 92). Various tribes of Indians along the

river, as the original occupants of the property, ceded all of their right, title and interest in and to their territory along the river by various treaties, and among the tribes of Indians involved was the Yakima Tribe, of which tribe the Petitioner is a member.

The Yakima Treaty of 1855 and similar treaties with other tribes were made when the Government acquired the lands along the river, so that they might be opened up for settlement. The right of ingress and egress enjoyed by the Yakima Indians arose out of Article 3 of the Treaty of June 9, 1855, which article reads as follows:

> "The exclusive right of taking fish in all of the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as is also the right of taking fish at all usual and accustomed places in common with the citizens of the territory, and erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." (12 Stat. 951) (R.77)

In construing this section of the treaty it was held by this Court, in United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 S. Ct. 662, that the Indians having reserved the right to fish at their old accustomed places, they also reserved the rights necessary to exercise the fishing right, which included the right of ingress and egress to the fishing grounds in the cus-

tomary manner—such access right being akin to an easement.

The Petitioner, Ray Hoptowit, a Yakima Indian, is engaged in business not as a fisherman but as a fish buyer and broker, competing with the Respondent in the purchase of fish. (R. 33). He purchases from the public generally, both Indians and white men. (R. 33). The right of the Petitioner to go over and across the Respondent's land for the purpose of fishing at all usual and accustomed places, where the Yakima Tribe of Indians were wont to fish, is not in controversy; nor is the right of the Petitioner to sell or trade the fish which he might catch himself at these usual and accustomed places, but the sole question is whether Article 3 of the treaty should be so construed as to vest in a member of the Yakima Tribe the right akin to an easement to go upon, across, and use the Respondent's lands, which he owns in fee simple, for the purpose of engaging in business as a commercial fish buyer and broker.

From a decree of the Circuit Court denying Respondent injunctive relief, the Respondent appealed to the Supreme Court of Oregon. The Supreme Court of Oregon, in ruling upon the matter, reversed the Circuit Court and authorized the injunction in accordance with the prayer of the complaint. In so ruling, the Oregon Supreme Court held:

"There is nothing in this treaty upon which the

> right of access to Respondent's lands for the purpose of carrying on the business of commercial fish buying may be based. The right to take fish in the streams; that is, "to fish" cannot form the basis for such an implied right of access because the right of fishing does not embrace the right to purchase and sell commercially." (R. 70)

It is this decision of the Oregon Supreme Court over which the Petitioner feels aggrieved and forms the basis of the Writ of Certiorari sought in this proceeding. The Petitioner's petition relies on four reasons or points for the allowance of the writ and, briefly summarized, these are as follows:

1. The decision of the Oregon Supreme Court is not in accord with decisions of this Court in the cases of:

> United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089;
> Seufert Bros. Company v. United States, 249 U. S. 194; 63 L. Ed. 555;
> Tulee v. State of Washington, 315 U. S. 681; 86 L. Ed. 1115.

2. The Supreme Court of Oregon, in arriving at its decision, gave the Yakima Treaty of June 9, 1855 the narrowest construction, and in construing the treaty overlooked the principle that the Yakima Treaty was not a grant of rights to the Indians but a grant of rights from them.

3. The Supreme Court of Oregon denied a member of the Yakima Tribe the right to buy and sell fish commercially caught by a member of the tribe at the usual and accustomed fishing places of the tribe, and in so

doing overlooked the evidence of fishing activities of members of the Yakima Tribe at the time of the execution of the treaty, to-wit, June 9, 1855.

4. The Oregon Supreme Court failed to consider the intent of the contracting parties, as shown in the minutes taken at the Council grounds preliminary to the execution of the treaty.

The Respondent, in this argument, will discuss each of the first and second points separately, and, since both the third and fourth points involved the evidence as to the intent of the contracting parties, will combine the argument on both of these points.

ARGUMENT ON PETITIONER'S FIRST POINT

With respect to the Petitioner's contention that the decision of the Oregon Supreme Court is not in accordance with the decisions of this Court in the cases of United States v. Winans, Seufert Bros. Company v. United States and Tulee v. State of Washington, it is submitted that the decision of the Oregon Supreme Court does not conflict with them.

In the case of United States v. Winans (cited supra), the defendant Winans was the holder of a patent from the State of Washington to certain shore lands on the Columbia River and, under permit from the State of Washington, had erected at old and accustomed fishing places of the Yakima Indians and other Indians devices for taking fish called "fish

wheels." The Government, in behalf of the Indians, brought suit to enjoin Winans from obstructing certain Indians of the Yakima Nation in the State of Washington from exercising fishing rights at such places. It was Winans' contention, apparently, that since he had purchased the shore lands and had a patent in fee from the government to adjoining property and had a permit from the State to operate the fish wheels, that the Indians would be trespassing upon his property if they attempted to fish at the place where he had his wheels. It was, of course, the Indians' contention that the existence of the wheels excluded them from fishing at their accustomed places. Winans further contended, according to the report, that the rights of the Indians existed only by virtue of the Treaty of 1855 (the same treay involved in this controversy) and that under Article 3 the only right reserved was the right of taking fish **in common with the citizens of the territory,** and since the only right reserved was to take fish in common with the citizens of the territory, the Indians had no other rights than those enjoyed by the public generally. In the case, the lower court dismissed the government's bill, but the United States Supreme Court reversed the lower court and, in construing Article 3 of the Treaty of 1855, stated:

* * * "There was an exclusive right of fishing re-

> served within certain boundaries. There was a right oustide of those boundaries reserved "in common with citizens of the territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—**the right to occupy it to the extent and for the purpose mentioned."** * * *

As a result of the Winans case, it was established that Indians who were members of the tribe that was a party to the Treaty of 1855 had a right in shore lands over and above those enjoyed by the public generally. The Court clearly stated its position when it said:

> "And surely it is within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as taking fish at all usual and accustomed places, nor does it restrain the State unreasonably, if at all, in the regulation of the right. **It only fixes in the land such easements as enable the right to be exercised."**

This case, seemingly, while it established easement rights of Indians, also limited the rights of the Indians, in that any easement must be such an easement as would enable the right to fish to be exercised. From this case it would clearly appear that where an Indian sought to exercise rights in the land which

were not necessary to accomplish the right to fish to be exercised, he would be a trespasser. We think it is significant in the Winans case that the lower court felt it would not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing. This ruling of the lower court was apparently not disturbed in the subsequent proceedings.

It would appear that in normal usage, the right to take fish is synonymous with the right to fish.

In 36 C.J.S., Fish, 829, Section 1, "fishing" is defined as follows:

> "To be employed **in taking fish** as by angling or drawing a net; a pursuit consisting, not of a single act, but of many acts, according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or of **taking them out of the water** and obtaining manual custody of them; it is a continuous process beginning from the time when the preliminary preparations are being made for **the taking of the fish** and extending down to the moment when they are finally reduced to actual and certain possession."

In state courts, where passed upon, the words "fishing" and "the taking of fish" have been treated as synonymous, viz: Johnson v. Hoy, 151 Ore. 196; 47 Pac. (2d) 252, the Court said:

> "We think this view places too narrow a construction upon the term "fishing." Such term is thus defined in 26 C. J. 594: "To be employed in

> taking fish as by angling or drawing a net; a pursuit consisting, not of a single but of many acts, according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or of taking them out of the water and obtaining manual custody of them; it is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession." We agree with appellants that picking up the net is a part of the fishing operation. **The last act is getting the fish into the boat."**

In the case of Seufert Bros. Company v. United States, (cited supra) this Court seems to have used the term "the right to fish" and "the right to take fish" interchangeably.

In State v. Tomich, 255 Pac. 122, 123; 143 Washington 364, it was held that alien cooks on fishing boats having no interest in the catch of fish and not actually engaged in handling of any gear or in actual taking of fish were held not to be punishable under the Washington statute prohibiting catching or taking of food fish by aliens, since they did not catch or take fish within the ordinary meaning of those words.

In lower courts, where passed upon, it has been held that the right to barter and sell fish is not within the terms of the treaty, viz: McCauley v. Makah Indian Tribe, 128 Fed. 2d. 867, the Court said:

> "The Makah treaty gave the same fishing rights as those of the Yakima treaty. * * *

> "The judgment also enjoins the appellants "from in any manner whatsoever interfering with or preventing the plaintiffs herein, or any of the members of the Makah Indian Tribe, from selling their fish caught and taken at said fishing place." Such an injunction is unwarranted for there is no allegation of the pleadings which mentions a threatened interference with regard to the sale of fish taken by the Makah tribe and the treaty is silent on the right of the Indians to dispose of the fish by sale or barter after they have been taken."

From the decisions to date, it would appear that the right reserved by these Indians on the property involved in this controversy is the right to fish at their accustomed locations, and that since, in this case, the petitioner is not a fisherman at all and desires to use the property of the Respondent as a place to carry on a business which is not fishing, it would appear that not only is the decision of the Oregon Supreme Court not in conflict with the United States v. Winans (cited supra), but that the Winans case itself clearly states that there are no easements in the land for any purpose other than to fish and, hence, no easement in the land to use it as a place to buy fish.

With respect to the case of the United States v. Seufert Bros. Company (cited supra), it is again difficult to see where the conflict exists. In this case, the government as the trustee for the Indians sought to restrain Seufert Bros. Company from interfering with Yakima Indians fishing on the south bank of the

Columbia River. The contention in this case on the part of Seufert Bros. Company was that the lands of the Yakima Indians were all north of the Columbia River and that, therefore, their rights did not extend beyond the middle of the stream and over on to the south bank of the Columbia River where the Seufert Bros. Company is located. This court, in this case, approved a restraining order prohibiting Seufert Bros. Company from interfering with the Yakima Indians when fishing at usual and accustomed places on the south bank of the Columbia River, the case simply established that the Yakima Indians under the Treaty of 1855 had reserved the right to fish at their ancient and accustomed places on the south bank of the Columbia River as well as the north bank. In this case, there was no activity involved but that of fishing and no other occupation involved. In view of that fact, it is difficult to see where this case would be in conflict with the decision of the Supreme Court when it held that buying and selling of fish as a broker was something different than fishing or taking fish.

The case of Tulee v. State of Washington (cited supra) was a case in which the State of Washington enacted a statute providing that it was unlawful to catch, take or fish for food fish with any appliance or by any means whatsoever, except with hook and lines, unless a license to do so was first procured, and pro-

vided a $5.00 fee for each dip bag net license for the taking of salmon on the Columbia River. Sampson Tulee refused to purchase a license and was convicted in the Superior Court for Klickitat County, Washington on a charge of catching salmon with a net without first having obtained a license as required by the state law. From the judgment of the Supreme Court of the State of Washington affirming the conviction, Tulee appealed to the Supreme Court of the United States and, in that decision, this Court held "that the State was without power to charge the Yakima a fee for fishing," notwithstanding the phrase "in common with citizens of the territory," contained in Article 3 of the Yakima Treaty. The Court stated that the exaction of a fee as a prerequisite to the enjoyment of fishing at their usual and accustomed places could not be reconciled with a fair construction of the treaty. In this case, the Court was concerned again with **actual fishing activity.**

In view of the fact that all three of the above mentioned cases dealt solely with fishing activity and construed Article 3 of the treaty with respect to such activities and, in view of the further fact, that the Supreme Court of the State of Oregon held that the brokerage business was not synonymous with fishing and that one takes fish in the stream by some method of fishing, not by purchase, it would appear that the

decision is in complete harmony with the above mentioned decisions of this Court. And, further, that under the limitations upon the type of easement granted, as laid down and defined in the Winans case, had the Supreme Court of Oregon ruled otherwise, the decision would not have been in accordance with the limitations set forth in the Winans case.

ARGUMENT ON PETITIONER'S SECOND POINT

As a second reason for the allowance of the Writ, the Petitioner suggests that the Supreme Court of Oregon, in arriving at its decision, gave the Yakima Treaty of June 9, 1855 the very narrowest construction and overlooked the principle that the treaty was not a grant of rights to the Indians but a grant of rights from them, to-wit, a reservation of those not granted. With respect to this contention, the opinion of the Oregon Supreme Court indicates that, while the Court recognized the rule that Indian treaties are to be liberally construed, they followed an equally **well-established rule that no right may be implied that does not have as its basis some express provision in the treaty itself.**

In 42 C.J.S. page 683, the text states:

> "The courts have power to construe treaties and agreements with Indians; the rule of liberal construction in favor of the Indians obtains, but the courts cannot disregard the obvious meaning of the terms used."

In Choctaw Nation of Indians v. United States, 63 S. Ct. 672, 678; 318 U. S. 423, this Court stated:

> "But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or achieve an asserted understanding of the parties."

And in Northwestern Bands of Shoshone Indians v. United States, 65 S. Ct. 690, 699; 324 U. S. 335, this Court stated:

> "All doubts," say petitioners, "must be resolved in their (the Indians') favor." Mr. Justice McLean, concurring in Worcester v. Georgia, 6 Pet. 515, at page 582, 8 L. Ed. 483, said, "The language used in treaties with the Indians should never be construed to their prejudice." But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

The Supreme Court of Oregon, in applying these rules, first found that the right to take fish and the right to fish were synonymous, and further found that the right to purchase and sell as a broker was not involved in the right to fish. Their conclusion, it would seem, is in accordance with well established principles of treaty construction.

As to the Petitioner's contention that there is sig-

nificance to the fact that the Yakima Treaty of 1855 was not a grant of rights to the Indians but a grant of rights from them, it is true that in some cases this principle has been given considerable weight, particularly in cases involving water rights for lands on Indian reservations in streams bordering upon or running through the reservation. (Skeem, et al. v. United States, 273 Fed. 93, 95; Winters v. United States, 207 U. S. 564; 52 L. Ed. 340.) But in this case, the Court is concerned not with the rights of Indians residing upon land, the full title of which has been wholly reserved, but is concerned with the rights of Indians off the reservation.

In Article 2 of the Yakima Treaty of 1855 there was reserved and set apart for the Indians certain therein described property; but other than the lands reserved and set apart in said article, the grant of the lands of the remaining territory of the Yakimas was absolute, viz:

> "Article 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish and convey to the United States all of their right, title and interest in and to the lands and country occupied and claimed by them and bounded and described as follows: * * * ." (12 Stat. 901) (R. 74)

The exception to the terms of this absolute grant, insofar as the rights of Indians off the reservation is concerned, would appear to be generally contained in Article 3 of the treaty; and by virtue of Article 3, off

the reservation there was reserved the right of taking fish at all usual and accustomed places. Therefore, in dealing with the right in property of the Indians off the reservation, it would appear that Article 3 defines and limits the rights of the Indians off the reservation, and it would seem that the right of Indians off the reservation can rise no higher than the express reservations therein contained.

ARGUMENT ON PETITIONER'S THIRD AND FOURTH POINTS

In the third and fourth points or reasons relied upon by the Petitioner he contends, briefly, that the Supreme Court of the State of Oregon denied a member of the Yakima Tribe the right to buy and sell fish commercially caught by members of the Yakima Tribe at the usual and accustomed places of the tribe, which is incidental to his fishing rights at these locations; and in so doing, has entirely overlooked the evidence of fishing activities of members of the Yakima Tribe at the time the treaty was executed; and, further, that the Oregon Supreme Court has failed to consider the intent of the contracting parties, as stated in the minutes taken at the Council grounds preliminary to execution of the treaty.

In respect to this contention, it appears that, in their opinion, the Oregon Supreme Court very carefully distinguished between the fisherman bartering

and selling his catch, and the Indian who was not a fisherman but was engaged solely as a broker buying and selling. (R.65). They did not deny the Indian fisherman the privilege of bartering or selling his catch in the customary manner. The Oregon Supreme Court did find that in the treaty negotiations, as shown by the minutes taken at the Council grounds preliminary to the execution of the same, that no suggestion was made of the right to purchase and sell fish commercially. And further found that there is a vast difference between fishing and purchasing fish. (R. 69). The Petitioner to the contrary notwithstanding, it would appear that the evidence in the case bears out this finding of the Oregon Supreme Court. The evidence submitted on behalf of the Petitioner in support of his contention that it was the intent of the contracting parties to contract with reference to the right of barter and sale consisted solely of:

(a) Defendant's Exhibit 1 (R. 80 and 34), which is a photostatic copy of the record of the official proceedings at the Council held in Walla Walla Valley between Governor Isaac I. Stevens, Gov. & Supt. W. T., and other agents of the United States, and chiefs and heads of the Yakima, Umatilla and other Tribes of Indians leading up to the execution of the Treaty of June 9, 1855. (12 Stat. 951);

(b) Statements quoted verbatim from historical books and documents. (R. 35-45).

A minute examination of the transcript of the proceedings which were had at the time of adoption of the treaty, does not disclose that there was ever under discussion a protective reservation for the purpose of barter and sale of fish; and, in fact, it was clearly stated by the government spokesman that the right reserved would be the right to leave the reservation and go to the usual fishing places and fish in common with the whites. (R. 115-117 Proceedings of June 5.)

In the negotiations leading up to the adoption of the treaty the references to fish or fishing, were of the following tenor:

June 2nd—Saturday

"General Palmer said * * * 'they say this land was not made for you alone, the air that we breathe, the water that we drink, was made for all. The fish that come up the rivers, and the beasts that roam through the forests and the plains, and the fowls of the air, were alike made for the white man and the red man.' (R. 103).

June 4th—Monday, 1855

"Gov. Stevens said: * * * 'there is plenty of salmon on these reservations, there are roots and berries.' * * * *" (R. 114).

June 5th—Tuesday

"Governor Stevens said: * * * 'This is a large reservation. The best fisheries on the Snake Riv-

er are on it; there are the fisheries on the Grande Ronde river. There are fisheries on the Os-ker-wa-wee, and the other streams. There are cumash grounds here at this place (pointing to the large cumash grounds of the Nes Perces). We feel if we put you on this Reservation our agent can visit you all and take care of you all.' (R. 116).

* * * "You will be allowed to pasture your animals on land not claimed or occupied by settlers; white men. You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation." (R. 117).

* * * "They take Salmon and catch whale and make oil. * * * " (R. 117).

June 7th—Thursday

"The Young Chief said: * * * 'The Salmon comes up the stream—that is all' * * * ." (R. 135).

"General Palmer said: * * * 'You will be allowed to go and catch fish and dig roots the same as the whites.' * * * " (R. 137).

"Pee-Pee-Mox-Mox said: * * * 'I said to Gen. Palmer that I desired permission to get fish there while I lived.' * * *" (R. 138).

"General Palmer said: * * * 'That we have agreed that Pee-Pee-Mox-Mox shall have the privilege of building a house at the mouth of the Yakima and catching fish for five years.' * * *" (R. 138).

June 9th—Saturday

"Gov. Stevens said: "* * * 'They have their res-

ervation and fishing stations which they well know and which I understand is satisfactory.' * * * " (R. 141).

"* * * 'You will not be called according to the paper to move on the Reservation for two or three years; then is secured to you your right to fish' * * *" (R. 142).

"Gov. Stevens: * * * 'that he can catch fish at any of the fishing stations' * * *" (R. 145).

From an examination of the proceedings it would seem that the Oregon Supreme Court had a sound basis for its finding that the parties had in mind a right to fish, no more, no less.

With respect to the historical references, it is submitted that they tend to establish only that the Indians engaged in the primitive form of barter common to uncivilized people from very earliest times. With respect to the practice of acting as a middleman or an independent fish buyer and seller in the commercial sense, the record noted only one reference to this particular occupation, and that is found in Washington Irving's Astoria or Anecdotes of an Enterprise Beyond the Rocky Mountains—Author's Revised Edition—1 Vol.—G. P. Putnam's Sons, page 150 (R. 36-37). The author, dealing with this particular phase of the matter, stated as follows:

"For like reason we would make special mention of the village at Wishram, at the head of the long narrows, as being **a solitary instance of an aboriginal trading mart or emporium.**"

This reference, it would seem, specifically notes that the trading mart referred to was a solitary instance, and supports the Respondent's claim that it was not the general practice of Indians to act as middlemen and factors. There is no evidence in the record as to what tribe participated in the operation of the emporium at Wishram, and there is absolutely no evidence that such emporiums were the general practice.

In any event, irrespective of the evidence with respect to the habits and customs of the Indians on this point, there was no provision in the treaty for a protective reservation with respect to the right to barter and sell fish. There is no evidence in the transcript of the negotiations showing that it was ever discussed. To find such a reservation within the terms of Article 3 of the treaty involved would, it is earnestly submitted, rewrite the treaty and expand it beyond its clear terms. In Winans v. United States, cited supra, this Court stated that the right reserved was that of taking fish, and such further easements in the land as would enable such right to be exercised. This would appear to be a clear statement as to the limit which the treaty may be expanded.

In conclusion, it is respectfully submitted:

(a) That the decision of the Oregon Supreme Court is not in conflict with any of the decisions of this

Court heretofore made, as the decisions relied upon by the Petitioner dealt only with actual fishing activity and not the bartering, selling and processing of fish.

(b) The Supreme Court of the State of Oregon, in its decision, did not give the Yakima Treaty of June 9, 1855 a narrow construction, but followed a well-recognized and sound principle of treaty construction; that while the rule of liberal construction in favor of the Indians obtains, the courts cannot disregard the obvious meaning of the terms used.

(c) That there is no basis for the implied grant of the rights contended for by the Petitioner, because there is no competent evidence in the record that the Indians ever understood that such rights were being reserved.

(d) That the rights contended for by the Petitioner should not be granted by implication, for the effect of doing so is to hold that the right to fish involves all acts incident to the use and processing of fish, such as the barter and sale, processing and canning. And to hold that the processing and canning, and bartering and selling of fish is a part of the act of fishing and within the protective provisions of the treaty itself, would permit the Petitioner to erect canneries, retail and wholesale markets upon the Respondent's prop-

erty and eventually, perhaps, exclude the Respondent from his property, all of which was wholly unintended at the time of the making of the treaty.

Dated this 27th day of March, 1952.

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